IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 431 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ARJANBHAI GALABHAI DUGAICHA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 431 of 1998
MR KR RAVAL for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
MR PR ABICHANDANI APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 04/11/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

#. The appellant-accused-Arjanbhai Galabhai Dugaicha has filed this appeal against the judgment and order of conviction and sentence dated 2.5.1998 passed by learned Additional Sessions Judge, Palanpur in Sessions Case No.119 of 1997 whereby the learned Judge convicted the appellant-accused for the offence under Section 302 IPC and sentenced him to suffer life imprisonment and to pay fine of Rs.400/= in default to further undergo simple imprisonment of 2 months and also convicted the accused under sections 394 read with Section 397 IPC and sentenced him to suffer 7 years RI and to pay fine of Rs.800/= in default to further undergo simple imprisonment for 4 months. However, both the sentences were ordered to run concurrently.

#. As per the charge Ex.3 dated 8.1.1998 prosecution case against the appellant-accused is that on the night of 30.4.1997 at 8.00 p.m. the appellant-accused induced deceased-Dana Tola and complainant Teja Goma and witness-Manji Hirji for having liquor and took them in the sim of village Kumbharia and committed murder of deceased-Dana Tola by giving axe blow on the head of deceased-Dana Tola and looted note of Rs.100/= from the complainant and silver anklet from complainant-Taja Goma by giving them threat to cause serious injury. Thus, the appellant-accused committed offence under Section 302 and 394 r/w section 397 IPC. The accused pleaded not guilty of the charge and claimed to be tried. To prove its case, the prosecution examined following witnesses :-

1. Ex.6 Teja Goma (complainant) PW-1

2. Ex.8 Nareshkumar Soni (Panch) PW-2

3. Ex.9 Somaji Raghaji (Panch) PW-3

4. Ex.14 Ranjitsinh Devda (Panch) PW-4

5. Ex.16 Naniben Jomtabhai PW-5

6. Ex.19 Manji Hirji (Eye Witness) PW-6

7. Ex.21 Desarji Kesarji Vaghela PW-7
(Executive Magistrate before

whom the test identification
parade was conducted)

8. Ex.24 Somabhai Magilal Vanzara PW-8

9. Ex.26 Revabhai Mananbhai PW-9
(Head Constable)

10. Ex.31 Vasudev M. Khatri PW-10
(Panch of T.I. Parade)

11. Ex.35 Govind Prajapati (IO) PW-11

12. Ex.43 Dr.R.C.Chauhan PW-12
(Medical Officer)

#. Following documentary evidence were produced by the prosecution :-

1. Complaint of complainant-Teja Goma Ex.7

2. Arrest Panchnama of accused Ex.10

3. Discovery Panchnama of weapon used by the accused for commission of offence and the place where the anklet was hidden by the accused Ex.11.

4. Inquest Panchnama Ex.12.

5. Panchnama of Scene of Offence Ex.13.

6. Yadi sent to Executive Magistrate for test identification parade of the accused Ex.22.

7. Panchnama of test identification parade held in presence of Executive Magistrate Ex.23.

8. Place where the accused has hidden 7 notes of muddamal robbed by the accused from complainant-Teja Goma.

9. FSL report Ex.40.

10. Serologist's report Ex.41.

11. Map of Scene of offence Ex.42.

12. P.M. note Ex.45.

13. Certificate of cause of death at Ex.46

#. Out of the aforesaid documentary evidence Exs.12, 13 and 42 were admitted with the consent of the defence counsel after the oral as well as documentary evidence was over. Learned APP gave purshis Ex.47 for closing evidence. Thereafter, further statement of the accused was recorded under Section 313 of the Criminal Procedure Code. In his statement under Section 313 of the Criminal Procedure Code, the appellant came out with the defence that the prosecution evidence is totally false and the police has falsely concocted case against him and involved him in this case. As according to him, at the time of commission of the offence, he was staying at Abu Road and doing private job and never came to Kumbharia. It was his further case that there are as many as three persons having similar name are staying in Kumbharia reached there, therefore, on mere suspension, the police has falsely involved him in this case. However, he has not preferred to examine any witness in support of his defence nor led any documentary evidence to show that he was not present at the time of commission of offence.

#. After considering the evidence of the prosecution witness as well as documentary evidence led by the prosecution and the defence of the accused, the learned Judge came to the conclusion that the defence of the alibi of accused cannot be accepted in view of the direct evidence of two prosecution witnesses; (1) Teja Goma (Complainant) and (2) Manji Hirji (Eye Witness). The learned Judge relied upon the evidence of these two witnesses, complainant-Teja Goma and Manji Hirji and other circumstances and came to the conclusion that the prosecution proved its case against the accused beyond reasonable doubt for committing murder of deceased-Dana Tola and committing loot and robbery of silver anklet and Rs.100/= from complainant-Teja Goma. Therefore, he convicted the accused for the offences under Sections 302, 394 and 397 IPC and sentenced him, as stated earlier.

#. The appellant has filed this appeal through jail, therefore, he was provided legal aid and Mr.Raval was appointed to defend his case. Mr.Raval has taken us though entire prosecution evidence and the defence of the accused and also the judgment of the learned Judge and the reasons assigned in it for convicting the accused and submitted that the prosecution has failed to prove its case beyond reasonable doubt. He, submitted that the

learned Judge committed grave error in convicting the accused as the prosecution failed to prove its case beyond reasonable doubt. Therefore, impugned judgment and order of conviction and sentence passed by the learned Judge be quashed and set aside and the accused be released from jail forthwith.

#. We will first consider his first submission regarding order of conviction and sentence passed by the learned Judge convicting the appellant-accused for the offences punishable under Section 394 and 397 IPC of looting and robbing complainant-Teja Goma.

#. PW-1, Teja Goma-complainant stated in his evidence before the court that deceased-Dana Tola was his cousin. On the day of incident, he along with deceased-Dana Tola and Manji Hirji (eye witness) came from Malpura to Abu Road, then from Abu Road to Ambaji. When they reached Ambaji it was 6.00 p.m. The accused asked whether liquor is available or not. Thereupon, the accused took all of them towards Kumbharia and there they were asked to wait by saying that he is just coming with liquor. Therefore, they waited there. Within short time, the accused came. At that time it was already 9.00 p.m. and the accused took them ahead towards the place like jungle and told them to take out money and by saying that he gave an axe blow on the head of deceased-Dana Tola and by that Dana Tola died there and then. Seeing that he and Manji Hirji started running but accused threatened them to kill by showing axe and told them to remove the silver anklet and to hand it over to him. He took out silver anklet and handed over the same to the accused and, thereafter he and Manji Hirji ran away and reached on the next evening to their village Malpura and informed about the incident to Somaji, Ranjitsinh, Asmal etc., who are leaders of the village. Thereafter, he along with Manji Hirji came back to Ambaji and straightaway went to Ambaji Police Station and lodged complaint (Ex.7). He and Manji were knowing accused, therefore, police kept them along with them. They stayed with the police for almost 3 days and searched for the accused in places like Ambaji and Kumbharia. When the accused was arrested neither he nor Manji was available. After arresting the accused, police called them for identification parade at Danta and asked the accused to stand along with ten persons and in presence of Mamlatdar he and Manji identified the accused out of the ten persons. Thereafter, they left for Malpura. He had identified the accused as well as his silver anklet (Article 9 recovered from the accused), which was having name of his father in law-Ramesh. This is the version before the court in Chief Examination.

#. In his cross-examination he has stated that there is a distance of 80-90 kms. between Malpura and Ambaji and two to two and half hours time is taken for coming to Ambaji from Malpura by bus. There are two police stations one at Revdar and another at Abu Road. It takes 20 hours to come from Malpura to Ambaji on foot. For the first time he came to Ambaji when the incident took place in Rajasthan. Almost all take liquor in Rajasthan and he was also taking liquor. His deceased Brother-Dana Tola has taken liquor and Manji has taken liquor, but he denied that they were addicted to the liquor. He has admitted that on the date of incident he, deceased-Dana Tola and Manji Hirji had taken quarter strong liquor of Gin. Witness Manji Hirji is also his cousin. They got bus at 2.00 p.m. at village Malpura for going to Abu Road. In between they got down at village Revdar where deceased-Dana Tola took cassette of Bhimjal and paid Rs.20/= for it. At that time he had Rs.200/= in is pocket. Deceased-Dana Tola had told him that he had Rs.10,000/= with him, whereas, Manji Hirji had Rs.150/= with him. He had paid fare of Rs.30/= for all the three persons from Malpura to Revdar. From Revdar to Abu they came by Rajasthan Transport Bus and reached Abu at 3.00 p.m. Again, he paid the fare of Rs.30/= for all three persons from Revdar to Abu Road. At Abu Road, deceased-Dana Tola paid Rs.60/= for Gin liquor. After going to lodge they consumed liquor and then had `dal bati'. Thereafter, they left the lodge and went to Abu Road station, which took 20 minutes. From there they got bus going to Ambaji. Dana Tola paid bus fare. They reached Ambaji at about 7.00 p.m. Prior to that, he had never come to Ambaji. After getting down from the bus at Ambaji they proceeded towards Kumbharia via Idarwada Gate. On the way they met one person, who was neither too black nor too white. He has clearly denied the suggestion put to him that all the three of them were unable to take care of themselves after they consumed liquor. He has stated that he, Manji and Dana used to borrow money from each other. He has specifically denied suggestion that he had borrowed Rs.5,000/= from Dana Tola and not paid back the same to Dana Tola. He has clearly denied the suggestion that because of that their relations were strained. He has also denied the suggestion that because of the sickness of his mother, he borrowed money from deceased-Dana Tola and not returned the same and because of that their relations were strained. When they reached Kumbharia, except three of them no one else was present. An unknown person met them on the way and he was asked by deceased-Dana Tola about the liquor. They were told by the unknown person that he

will come back with liquor. When they were smoking beedi, unknown person came back and thereafter they proceeded towards Jain temple of Kumbharia. He has clearly stated in his cross-examination that he had not seen any pointed stone near the scene of offence and that there it was an open land. He has clearly denied the suggestion that if some one falls on a pointed stone then he may die. However, he has admitted that if head is hit on the big stone then man may die. However, he has clearly denied the suggestion that prior to this incident he had quarrel with Dana Tola and Manji. He has also denied the suggestion that all three of them were in a drunken condition and because of that scuffle took place between them, and then the incident took place. He has clearly denied the suggestion that he and Manji, deceased-Dana Tola had Rs.10,000/= with him and because of that they killed Dana Tola. He has also denied the suggestion that scuffle took place for a considerable time between him and Dana Tola and because of that scuffle he fall on the pointed stone and died. He has also denied that after Dana Tola died he took out notes of Rs.10,000/= from the pocket of deceased Dana Tola and ran away with them.

He has clearly stated in his cross-examination that after accused hit Dana Tola with an axe, he threatened him to hand over his anklet by showing axe. Therefore, with a view to save himself from the accused, he handed over the silver anklet to the accused and ran away. Before that Manji escaped from the place of incident. Thereafter, he and Manji went to village Malpura by running and slept there at 4 O' clock in the morning. At 9.00 a.m. they started running and reached Malpura at 5.00 p.m. and met all the village people at 6.00 p.m. and informed them about the incident. On the next day morning again he, Manji Hirji and other village people came to Ambaji by hiring special jeep and lodged complaint before the police. He has also stated that when they were lodging complaint, accused was also brought in jeep at Ambaji Police Station along with two other persons Sona Teja Angari and Babu Krishna, but later on he stated that only accused was brought. When accused was brought to Ambaji, he was in a drunken condition. He has denied the suggestion that in his presence that he was beaten up in the police station. He has stated in his cross examination that first day he could not identify the accused because he put on white dress and dhoti and lungi was kept by him on his shoulders. On the next day also he could not identify the accused because he had put on only baniyan and lungi and removed the mustaches, but on the third day - he

could identify the accused in presence of Executive Magistrate. He has also stated that police told him that he was the accused and, thereafter, the accused was identified by him. He has also stated that police had beaten him, Manji and also the accused, therefore, they were frightened and the accused vomited out the truth. Till he lodged the complaint, the dead body of Dana Tola was lying there at the place of incident. However, he has specifically denied the suggestion that he had killed deceaed-Dana Tola. He stated in his cross-examination that when he had seen the accused for the first time, at that time he was having mustaches but later on he got it removed, therefore, in the police station he could not identify him. He has also admitted that when Dana Tola was beaten he had not raised any shouts. He had also denied the suggestion that he had filed false complaint with a view to falsely involve the accused in the case. He has also stated that he had not lodged complaint at Abu or Revdar, because other people told him that he had to lodge complaint only in Gujarat. He has sated in his cross-examination that he has falsely stated in his complaint that they were going to repay loan of Rs.10,000/=. He has also admitted that on both the occasions while coming and going to Danta, the accused was with them. He has clearly denied the suggestion that he has filed false complaint against the accused.

##. From the above, it is clear that there is not even a remote suggestion in the cross-examination that the accused had not threatened him with axe and robbed his anklet, having name of his father-in-law. Therefore, in our considered opinion, the prosecution has proved its case against the accused for the offence under Sections 394 and 397 IPC.

##. This brings us to the order of conviction and sentence recorded by the learned Judge convicting the appellant-accused for the offence under Section 302 and sentencing him to suffer life imprisonment. We have already narrated in detail the evidence of complainant Teja Goma-PW-1, who was eye witness to the incident. Therefore, there is no need for us to repeat the same for the purpose of coming to the conclusion as to whether the learned Judge has committed any error in holding him guilty for the offence under Section 302 IPC or not.

Mr.Raval, learned appointed advocate for the appellant-accused firstly submitted that as per the admission of complainant-Teja Goma, deceased Dana Tola was having Rs.10,000/= with him and that was known to complainant-Teja Goma and eye witness Manji Hirji.

Except these two persons nobody else was present with the deceased at the time of incident, therefore, complainant-Teja Goma must have killed the deceased-Dana in drunken condition and to save themselves, he has falsely involved the accused. He submitted that at the place of incident scuffle must have taken place between complainant-Teja Goma and deceased-Dana Tola and because of that deceased-Dana Tola must have died falling on the pointed stone. He submitted that the defence of the accused is duly corroborated by the evidence of Dr.R.C.Chauhan Ex.43, as Dr. Chauhan in her cross-examination clearly stated that if a person falls on a pointed stone, then injury, caused on the dead body was possible. But, Dr. Chauhan has clearly stated in her evidence that after looking at the muddamal article i.e. axe that the injury on the portion of the head of the deceased was possible by muddamal axe. In her cross-examination she has clearly denied suggestion that injury on the head was not possible by that axe. It was only general suggestion put to the doctor that if a person falls on a pointed stone, then such injury was possible or not for, which was answered in affirmative. Therefore, defence theory of accused-Dana Tola dying due to fall on pointed stone due to scuffle between him and complainant-Teja Goma is not only improbable, but false, therefore, it cannot be accepted.

##. Coupled with the direct evidence of Teja on the point that the accused inflicted fatal blow on the head of Dana Tola with an axe, there is an evidence in the form of medical evidence. Dr.Chauhan PW-12 Ex.43 has clearly stated in the evidence that injury was possible with muddamal axe. FSL report shows that human blood was found on it. When the accused was arrested he was wearing shirt having blood stains, which was having `B' group. Under the circumstances, it is only an imagination of the accused that due to scuffle between complainant-Teja and Dana Tola, deceased-Dana Tola must have died due to fall on a pointed stone.

##. It is no doubt true that on the weakness of defence, the accused cannot be convicted. The prosecution has to prove its case beyond reasonable doubt by leading direct evidence or circumstantial evidence. In this case, as stated earlier, the prosecution has examined two eye witnesses: (1) Complainant-Teja and (2) Manji Hirji. We have already reproduced in nutshell the evidence of Teja Goma. It is no doubt true that there are certain minor discrepancies and infirmities in his evidence, but such type of discrepancies and infirmities are bound to be there when rustic tribal persons depose before the court.

Merely because there are minor discrepancies or infirmities in their evidence that itself would not be a ground to discard their evidence, which is otherwise found to be reliable.

It is no doubt true that there is a delay of two days in lodging FIR. The prosecution has tried to explain the same by stating that after the incident both the complainant-Teja and Eye Witness-Manji Hirji reached their village Malpura running, which is at a distance of 80 kms. from the place of the incident. This part of their evidence is not at all reliable when they say that by running means that they rushed to their village. They must have been so much terrified and horrified because of the incident that they could not lodge the complaint immediately on that night or on the next day of the incident. On the third day, they must have mustered courage after meeting the leaders of their village and decided to lodge complaint. The way in which the complainant-Teja Goma deposed in his cross-examination about the test identification parade of the accused leaves no room of doubt that in a most natural way he had deposed before the court. He has clearly stated in his cross-examination that on the first day when the accused was produced before them he was not able to identify him because he was in a different dress. Second time, he was not able to identify him because he had removed his mustaches. But third time, when he was called for identification in presence of Mamlatdar he could identify accused. It may be stated that the complainant-Teja had no enmity with the accused, therefore, falsely involving the accused in this case, was out of question. It was an evening time when they first met the accused. Then, they travelled together for a considerable distance, therefore, there was no question of mistaken identity of the accused by him because he was very much there and in fact he handed over his anklet to the accused because of his threat.

##. Mr.Raval then submitted that after arresting the accused only seven notes of Rs.10/= in all Rs.70/= were recovered from the accused. He submitted that as per the admission of complainant-Teja Goma, deceased Dana Tola was travelling with Rs.10,000/= cash with him. If that is so then police should have recovered Rs.10,000/= and not an amount of Rs.70/=. In support of submission Mr.Raval has relied on the averments made in the complaint at Ex.7. It is true that the complainant had stated in his complaint that Dana had borrowed Rs.10,000/= from their cousin-Dana Rana and they were going to repay that amount, but, in his

cross-examination, he has clearly stated that he has falsely stated that fact in his complaint. In that case, recovery of Rs.70/= from the accused supports the case of the prosecution that along with silver anklet he robbed Rs.100/= from complainant-Teja Goma.

##. There is an evidence of one more eye witness viz. Manji Hirji. He has also identified the accused. There are some minor discrepancies in his evidence, but in our considered opinion that will not be sufficient to discard his evidence, which is otherwise found to be trustworthy. He has denied the suggestion that he had not seen accused giving axe blow with the axe to deceased-Dana. Mr.Raval has drawn our attention on the admission made by Manji about the cross-examination of his clothes put on by the accused at the time of incident. But after making the suggestion in his cross-examination that he had not stated in his police statement that at the time of incident accused had put on colour pant, the matter was not carried further and the same was not proved in the evidence of I.O., Police Inspector, Shri Govind Prajapati. Similarly suggestion was put to him that he had stated in his statement before the police that they were going to repay amount of Rs.10,000/= but that was also not proved in the evidence of I.O. In that view of the matter, all these suggestions remained suggestions as such and nothing turns out from it. He has frankly admitted in his cross-examination that he was also kept in the lock up by the police and beaten. It my be that he and complainant-Teja Goma were with the deceased-Dana Tola at the time of incident. On material point about assault made by the accused with an axe on the head of deceased-Dana Tola there is no material contradiction. In that view of the matter, it cannot be said that the learned Judge was wrong in convicting the accused for the offences under section 302 IPC for committing murder of deceased-Dana Tola.

##. In addition to the above, there is an evidence of Naniben Jomtabhai PW-5 Ex.16, who has clearly stated in her evidence that the accused ran away with the muddamal axe-article No.10, which was found to be used in the commission of an offence. There is also an independent evidence in the form of Desarji Kesarji Vaghela, retired Mamlatdar, Executive Magistrate, Danta in whose presence the test identification parade was held. He has stated that out of 10 persons both eye witnesses complainant-Teja and Manji had identified the accused.

##. In view of the above discussion, we do not find any substance or merit in this appeal and in our considered

opinion the learned Judge has rightly convicted the appellant-accused for the offences under Section 302, 394 r/w Section 397 IPC and sentenced him accordingly.

##. In view of the above, this appeal fails and is hereby dismissed. The appellant-accused, who is kept personally present before this court from the concerned jail is ordered to be sent back to the jail forthwith.

(B.J.Shethna, J.)

(Ravi R. Tripathi, J.)

*Pvv